

7344
DECISION



J. Cohen
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: R-189598

DATE: August 14, 1978

MATTER OF: Creative Electric Incorporated

DIGEST:

1. Protester withdrew protest after Air Force (AF) agreed to provide protester with information regarding other offerors and technical evaluations under RFTP to extent allowable by regulation. Protest that AF has not furnished all data involved is not appropriate for review, since no procurement action is involved. In addition, in response to protester's request under Freedom of Information Act, AF has furnished substantial portion of such data, apparently to protester's satisfaction.
2. Protest that solicitation's specifications and evaluation criteria were unclear, filed after closing date for receipt of initial proposals, is untimely and will not be considered on merits. Protest that agency improperly refused to convene conference for potential offerors, filed more than 10 working days after such refusal, is also untimely. Neither issue is considered "significant" under our Procedures to permit consideration.
3. Protest that agency's responses to protester's technical questions were in part "erroneous" is denied, since protester admits that such responses had no effect on its proposal.
4. Protester speculates that AF improperly discussed price and technical factors with eventual successful offeror prior to receipt of initial proposals. AF responds that it discussed price and technical elements of such firm's existing equipment prior to initiation of procurement, but that no discussions of any kind were conducted after procurement was initiated and prior to receipt of initial proposals. Protester has not affirmatively shown that AF acted improperly.

5. Protester contends that it was misled by oral statement from contracting officer that item solicited was not another vendor's off-the-shelf item. Protest is denied, since RFTP cautioned bidders not to rely on oral advice; RFTP indicated that item may be readily available; and protester, whose proposal was rejected because it failed to furnish required technical information, was not prejudiced thereby.
6. Protest that awardee failed to furnish with its proposal manufacturer's standard literature required as evidence of "previous successful efforts" is denied. AF position that proposal itself essentially met such requirement is not unreasonable.
7. Protest against AF award of contract without performing preaward survey is without merit, since preaward survey is not required by Armed Services Procurement Regulation. Moreover, GAO does not review protests against affirmative determinations of responsibility except under circumstances not applicable here. Whether awardee complies with contract requirements is matter of contract administration and is not for consideration by GAO.
8. Claim for proposal preparation costs based on contention that claimant was fraudulently induced to submit proposal with no chance for award is denied. Issues untimely raised in claimant's bid protest may not be considered in context of claim, and record on timely raised issues does not support claimant's position.

Request for technical proposals (RFTP)
No. F30635-77-60081 was issued by the Department of the Air Force on April 22, 1977, to provide, install and test a wide-band, wave-form generator at Griffiss Air Force Base, New York.

By letter to the Air Force dated May 6, Creative Electric Incorporated (CE) requested a conference to clarify certain matters in the RFTP. In the alternative, CE requested the answers to five technical questions. By letter of May 16, the Air Force declined to schedule a conference and provided answers to CE's questions. CE submitted its proposal by June 10 as required.

On July 8, CE received a letter from the Air Force advising that its technical proposal was rejected "based on failure to furnish sufficient information as required in our letter request for technical proposal."

On July 14, CE filed a protest in our Office against the rejection of its proposal, contending that the RFTP's specifications and evaluation criteria were unclear.

The protest was withdrawn on August 1 on the basis of an agreement reached between the Air Force and CE. The agreement is represented in telegrams of July 28 and 29 between the parties.

In the July 28 telegram, CE agreed to withdraw its protest if, among other things, it was furnished a copy of the successful technical proposal, the evaluation report concerning the successful technical proposal, a list of the firms that received the RFTP, and the successful offeror's evidence of same or similar operating systems required for evaluation by paragraph 1.1.4 of the RFTP.

In the July 29 telegram, the contracting officer stated in pertinent part:

"* * * Upon contract award, we will provide you with all pertinent information except that identified in ASPR § 3-508.4C(I) thru (IV). Please understand that I am not taking exception to your request. I am merely clarifying what I am or am not authorized to do so as to avoid any misunderstanding."

CE was advised by the Air Force of the specific reasons for the rejection of its proposal at a debriefing on January 5, 1978.

CE filed another protest in our Office on January 19, 1978. The basis for CE's protest is essentially that the Air Force has not furnished CE the information referenced in the July 28, 1977, telegram noted above. CE further argues that since the Air Force has allegedly breached the agreement that served as consideration for CE's withdrawal of its earlier protest, we should consider the matters raised in that protest. CE also adds the following allegations: (1) certain information required by the RFTP was unnecessary and could not be furnished by any offeror; (2) the Air Force's refusal to convene a conference was improper; (3) the Air Force's May 16 responses to CE's May 6 questions were in part "erroneous"; (4) the Air Force held improper discussions with the eventual successful offeror prior to the receipt of initial proposals; (5) CE was misled by oral statements from Air Force engineers into believing that the generator was not another vendor's off-the-shelf item; (6) the awardee (RCA) failed to furnish with its offer necessary manufacturer's standard literature for certain RFTP requirements; (7) RCA did not address the RFTP requirement for "reference frequencies" (specified signals that may be made to issue from the equipment), and is in fact not providing all reference frequencies required; and (8) a preaward survey of RCA should have been, but was not, conducted.

Finally, CE requests that, if corrective action is impractical at this time, it be reimbursed for the expenses incurred in preparing its proposal on the basis that CE was induced to do so by the Air Force although the Air Force always intended to award the contract to RCA.

In regard to the Air Force's alleged failure to fulfill its agreement with CE, we do not consider the matter appropriate for our review, since no procurement action is involved. See, generally, introduction to and section 20.1(a) of our Bid Protest Procedures, 4 C.F.R. part 20 (1977) (Procedures). We note, however,

that in response to a request filed by CE under the Freedom of Information Act, 5 U.S.C. § 552 (1976), the Air Force has furnished CE with a substantial portion of the data involved in the agreement, apparently to CE's satisfaction.

In any case, CE's protest of July 14, 1977, itself, was not timely under our Procedures. Section 20.2(b) thereof provides in pertinent part:

"(b)(1) Protests based upon alleged improprieties in any type of solicitation which are apparent prior to * * * the closing date for receipt of initial proposals shall be filed prior to * * * the closing date for receipt of initial proposals.

"(2) In cases other than those covered in subparagraph (1) bid protests shall be filed not later than 10 [working] days after the basis for protest is known or should have been known, whichever is earlier."

Thus, pursuant to section 20.2(b)(1), a protest involving the clarity of the RFTP's specifications and evaluation criteria had to be filed by June 10, 1977, when initial technical proposals were due. Since the protest on those matters was not filed prior to that date, it cannot be considered on its merits.

Concerning the matters raised for the first time in CE's January 19, 1978, protest, the contention that the RFTP required unnecessary data also should have been filed before proposals were due on June 10, 1977, and is, therefore, untimely under section 20.2(b)(1) of our Procedures. The protest against the Air Force's refusal to convene a conference should have been filed within 10 working days after CE's receipt of the May 16, 1977, letter. See section 20.2(b)(2). Accordingly, we will not consider that issue either.

Concerning the contents of the Air Force's May 16 letter, the record is not clear whether the protest thereon was timely filed. However, the record does indicate that in a letter to the Air Force dated January 17, 1978, CE stated:

"* * * The answer [in paragraph 4 of the May 16, 1977, letter] is obviously wrong. It would be foolish to suppose that this one answer by itself should be so important as to cause serious damage to the proposer. I brought the subject up simply to provide an example of the poor attention given to our questions. Paragraphs 2, 5, and 6 of the same letter contain similarly faulty answers."

On that basis, we do not consider that CE was prejudiced by the Air Force's response to the questions.

Regarding CE's fourth point, CE states that it has "reason to believe that both price and technical factors were discussed with RCA before the opening of Step I proposals." However, the Air Force indicates in a report on the protest:

"* * * it is true that both price and technical factors of the 'existing RCA equipment' were discussed prior to initiation of the procurement. However * * * no discussions of estimated price * * * were carried out and no discussions of any kind, technical or cost, were carried out after initiation of the procurement * * *."

In view thereof, we cannot consider that CE has affirmatively proven that the Air Force's actions in this regard were improper. See, Reliable Maintenance Services, Inc.,--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337.

Concerning issue (5), the Air Force denies that any such advice was given and states that an off-the-shelf item not a development effort, was in fact desired. The Air Force also argues that, in any case, the solicitation clearly cautioned offerors not to rely on oral explanations or instructions given before the award of the contract.

CE's proposal was rejected because it failed to include certain technical information. Therefore, and even notwithstanding the noted RFTP warning, we do not see how CE was prejudiced by the advice allegedly received from the contracting officer on this matter. We also note in this connection that the RFTP contains indications that wave-form generators of the type solicited have been developed and may be readily available. For example, paragraph 1.1 of the RFTP, "Types of Data Required for Evaluation," requires an offeror to submit evidence of "previous successful efforts," which was to be a "major" technical evaluation consideration; section 1.1.4 of the paragraph includes as such evidence "Locations and specifications of successful operating systems as described in the RFTP or similar systems * * *." (Emphasis added.)

In regard to the sixth issue, section 1.1.2 of RFTP paragraph 1.1 cites as evidence of "previous successful efforts":

"1.1.2 Manufacturer's standard literature describing all system components where applicable. Such literature shall include catalogues, specifications sheets, diagrams and charts which explain the principal features including engineering and performance data and specifications, as well as reference to reliability and maintainability."

CE points out that one of the reasons given by the Air Force for the rejection of CE's proposal was the failure to supply manufacturer's literature. CE argues that if RCA also failed to do so, RCA's proposal must be rejected as well.

The Air Force states:

* * * The contracting officer accepted RCA's proposal in toto as manufacturer's literature, because it describes (to quote from the introduction to the RCA proposal):

'a fully compliant system design which is based on minor modifications to proven equipment that is presently operating in the high power transmitter laboratory at RCA, Morristown.'

* * * Specific examples of 'standard literature type' may be found on pages 1-6, 1-11, 2-2, 2-5, 2-7 and 2-8 and 2-11 through 2-15. Although the entire proposal constitutes manufacturer's standard literature, the above are examples of dataing types in both format and content.

* Creative Electric (CE) proposal was rejected * * * [by] letter dated 28 June 1977 * * *. The primary cause for rejection [of CE's proposal] is 'no location, specifications, or summary description of successful operating systems with modifications as required by Section 1.1.4 of the RFP were included in the proposal.' * * * From a review of both proposals it is evident that RCA was proposing minor modifications to an

existing system and CE was proposing a system for development."

A protest concerning manufacturer's literature in relation to CE's proposal was not filed within 10 working days after receipt of the June 28, 1977, letter from the Air Force and will not, therefore, be considered on its merits. Section 20.2(b)(2) of our Procedures. Regarding RCA's proposal, in view of its contents and the purpose for the subject literature--evidence of previous successful efforts--we see no basis to disagree with the contracting officer's view that the RFTP requirement was essentially fulfilled.

Concerning issue (7), the Air Force points out that the RCA proposal in fact did include the required reference frequencies. Moreover, whether RCA's performance in fact conforms to that contractual requirement is a matter of contract administration and is not for our consideration. Virginia-Maryland Associates, B-191252, March 28, 1978, 78-1 CPD 238.

Regarding the lack of a preaward survey, the Air Force states that the determination of RCA's responsibility was based on data already available to the contracting officer, as authorized in Armed Services Procurement Regulation § 1-905.4 (1976 ed.). See, also, Rushton Industrial Construction, B-191825, June 12, 1978, 78-1 CPD 427. In any case, our Office does not review protests against affirmative determinations of responsibility unless either fraud on the part of procuring officials is alleged, or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376; neither exception is applicable here.

In regard to the issues determined above to have been untimely raised, CE has requested that we review the merits of any untimely matters under section 20.2(c) of our Procedures, which provides that we may consider

an untimely protest whenever we determine that it raises significant procurement issues. However, as we stated in Catalytic, Incorporated, B-187444, November 23, 1976, 76-2 CPD 445:

"* * * we have held that the significant issue exception to the timely filing requirement must be exercised sparingly if our timeliness standards are not to become meaningless. COMTEN, B-185394, May 18, 1976, 76-1 CPD 330. Thus, we will not regard an issue as significant unless it is of widespread interest or goes to 'the heart of the competitive procurement process.' Willamette-Western Corporation, et al., 54 Comp. Gen. 375, 376 (1974), 74-2 CPD 259; 52 Comp. Gen. 20 (1972).* * *

We do not consider that the issues involved here meet that standard.

Accordingly, we dismiss the protest concerning issues not timely raised under our Procedures and deny the protest on the remaining issues.

Finally, CE's claim for proposal preparation costs is in effect based on its belief that it was fraudulently induced to submit an offer under the RFTP in that award to RCA was inevitable. See, in this connection, Heyer Products Company v. United States, 140 F. Supp. 409 (Ct. Cl. 1956). However, since the issues untimely raised cannot be considered in relation to the claim, DWC Leasing Company, B-186481, November 12, 1976, 76-2 CPD 404, and, in view of our discussion above, the claim must be denied.

Deputy


Comptroller General
of the United States